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No. 87-65

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

PROVIDENCE JOURNAL COMPANY AND CHARLES M. HAUSER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the district court properly held respondents, a newspaper and its executive editor, in criminal contempt for publishing material in violation of a temporary restraining order that was entered pending a hearing on a motion for a preliminary injunction, where respondents failed to seek emergency review of the temporary restraining order.

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INTEREST OF THE UNITED STATES

The prosecution of criminal contempts, like the prosecution of other federal crimes, normally is undertaken by the Department of Justice. In this case, however, the district court, acting prior to this Court's decision in *Young* v. *United States ex rel. Vuitton et Fils S.A.*, No. 85-1329 (May 26, 1987), appointed a private attorney to assist it in connection with charges of criminal contempt by presenting the evidence of those charges to the court. In *Young*, this Court held that although a federal district court possesses the power to appoint a private attorney to "prosecute" a charge of criminal contempt in this manner, "a court ordinarily should first request the appropriate prosecuting authority to prosecute contempt actions, and should appoint a private prosecutor only if that request is denied" (*Young*, slip op. 13). For reasons that we regard as insufficient, the district court did not follow that procedure in this case.[1] As a result, contempt charges were presented below, and are being pursued before this Court,

[1] The district court chose not to ask a representative of the Department of Justice to undertake the prosecution because the Federal Bureau of Investigation and the Department of Justice were defend-

in the name of the United States but not by the Department of Justice. The government has an interest in the disposition of the issues presented in this case, because the Court's decision will affect those criminal contempt cases—which constitute the vast majority—that are prosecuted by the Department of Justice.[2]

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ants in the underlying civil action from which the contempt charge arose (Pet. App. A5). However, the United States is a party to many civil and criminal cases from which contempt proceedings arise, and the United States commonly has an interest in the underlying proceeding that is either consistent with or contrary to the interest of the party who is charged with contempt. That fact alone does not disqualify a government attorney from pursuing criminal contempt charges referred by the district court. In this case, the charge of contempt involved the conduct of the Journal, not that of the FBI or the Department of Justice, and it was brought solely to vindicate the authority of the district court, not to advance the private interests of the plaintiff (or the governmental interests of the FBI or the Department of Justice) in the civil action. There is no reason to believe that under these circumstances a government attorney would have encountered a conflict of interest, or otherwise would have found his independent judgment compromised, in prosecuting the contempt charge against respondents.

Moreover, this case is not like *Young*, in which the private attorney appointed to prosecute the criminal contempt on behalf of the public had a private client who might have conflicting interests. In that situation, the policies underlying a criminal conflict-of-interest statute (18 U.S.C. 208(a)), as well as ethical standards, barred the dual representation. In this case, by contrast, the government attorney would have a *single* client—the United States—in the underlying civil action and the criminal contempt prosecution, and there would be no statutory or regulatory prohibition against his representing that single client in the two separate proceedings.

[2] Under 28 U.S.C. 518(a), unless the Attorney General otherwise directs, the Solicitor General must conduct and argue all cases in this Court "in which the United States is interested." In light of the decision in *Young*, we believe that this provision is best read as referring to cases in which the United States is "interested" by virtue of the constitutional and statutory responsibilities of the Executive Branch. Where, as in *Young* and the instant case, a contempt is punished in proceedings that are wholly internal to the Judicial Branch as an ancillary aspect of its powers under Article III (see *Young*, slip op. 7-12)—rather than by a prosecution initiated by the Executive Branch in accordance with its responsibilities under Article II and 28 U.S.C. 547—proceedings in this Court arising out of the contempt citation would fall outside the scope of Section 518(a). For that reason, we do not believe that the authorization of the Solicitor General is required in order for the specially appointed private attorney to seek review in this Court on the district court's behalf.

STATEMENT

1. From 1962 to 1965, the Federal Bureau of Investigation conducted electronic surveillance of the home of Raymond L. S. Patriarca in Providence, Rhode Island. Patriarca was reputed to be a senior member of a New England organized crime "family," and the surveillance was carried out as part of an investigation into organized crime in the area. The surveillance, conducted prior to the enactment of the federal wiretapping statute, 18 U.S.C. 2510 *et seq.*, was not performed pursuant to judicial authorization and therefore violated the Fourth Amendment. See *Providence Journal Co.* v. *FBI*, 602 F.2d 1010, 1013 (1st Cir. 1979), cert. denied, 444 U.S. 1071 (1980).

The FBI eventually destroyed the tape recordings produced by the surveillance of the Patriarca home, but it retained written logs and memoranda compiled from the recordings. In November 1976, the Journal sought disclosure of the logs and memoranda pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552. The FBI declined to release the materials on the ground that they fell within FOIA Exemption 7(C), 5 U.S.C. 552(b)(7)(C), which permits the withholding of information compiled for law enforcement purposes if disclosure would constitute "an unwarranted invasion of personal privacy."

The Journal brought suit against the FBI to compel disclosure of the materials. On appeal from the district court's decision, which required disclosure of limited portions of the materials, the First Circuit ruled that the FBI was acting within its discretion under Exemption 7(C) in

refusing the Journal's request in its entirety. *Providence Journal Co.* v. *FBI, supra.*

2. In 1984, Raymond Patriarca died. Shortly thereafter, the Journal renewed its request for the logs and memoranda. This time, the FBI released the materials to the Journal. The FBI made the same materials available to other members of the news media, including WJAR (a Providence television station) and the Hartford *Courant* (a Connecticut newspaper). Pet. App. A29. The Hartford *Courant* published an article based on some information derived from the FBI logs and memoranda on September 22, 1985 (J.A. 35, 101-113, 141-143).[3]

On November 8, 1985, Raymond Patriarca's son, whose conversations with his father had been among those monitored by the FBI, filed suit in the United States District Court for the District of Rhode Island to prevent the Journal and WJAR from disclosing the contents of the FBI materials. In addition, Patriarca's son sought damages and declaratory relief from the FBI and the Department of Justice for releasing the materials. The complaint was based on the FOIA, the federal wiretapping statute, and the Fourth Amendment. At the same time, Patriarca's son filed a motion for a temporary restraining order or a preliminary injunction barring further disclosure of the FBI materials during the pendency of the case. J.A. 206, 217-218.

[3] In addition, plaintiff alleged (J.A. 209) and the Journal's November 14 article reported (*id.* at 10) that WJAR had broadcast a news story on November 6 based on information it had obtained from the FBI. The record does not suggest that the actions of the Hartford *Courant* and WJAR disclosed all of the relevant information from the voluminous FBI materials, and there is no indication that respondents urged the district court to deny or terminate the restraining order on the ground that the relevant information was already in the public domain. See *id.* at 58-88, 142-143.

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On the afternoon of November 13, 1985, the district court held a conference regarding the application for a temporary restraining order (J.A. 175-176). Over the objections of the Journal's attorney, who argued that any restraining order would violate the First Amendment, the district court granted the application.[4] The district court originally expressed its intention to hear arguments on plaintiff's request for a preliminary injunction on November 14, the following day (*id.* at 34). However, the Journal's attorney advised the district court that the Journal would need more time to prepare adequately for the hearing (*id.* at 167). The district court therefore entered an order temporarily restraining the Journal and WJAR from disclosing the contents of the logs and memoranda, insofar as they related to Patriarca's son, pending a hearing at 10 a.m. on November 15, less than 48 hours later (*id.* at 6-7). Pet. App. A3-A4, A18.

The Journal's counsel informed the Journal's management of the temporary restraining order later in the afternoon of November 13 (J.A. 34). Nevertheless, over the course of the evening of November 13, the Journal's management decided to publish an article based on the logs and memoranda the following morning (*id.* at 121-123, 138-139). The Journal published one article on what it called "the Patriarca tapes" in its morning edition on November 14 and published the same article again in the afternoon edition (*id.* at 34). The Journal's management was aware at all relevant times that publishing the article on November 14 would violate the district court's temporary restraining order (*ibid.*). The Journal's executive editor, respondent Hauser, subsequently testified that the decision to publish was based in part on the belief that the restraining order was an unconstitutional prior restraint and in part on the belief that complying with the

[4] The government also opposed the temporary restraining order (Pet. App. A29).

order "would be a clear signal to people that frequently like[] to block publication of something" (*id.* at 122-124).

At the scheduled November 15 hearing, the district court extended the restraining order for four days (J.A. 64-65, 71). Then, on November 19, the court vacated the order and denied the plaintiff's motion for a preliminary injunction (*id.* at 85). The Journal apparently did not publish any additional articles based on the information after the restraining order was vacated (Pet. App. A24).

3. On November 14, the day on which the Journal published its article, Patriarca's son moved to have the Journal and Hauser held in criminal contempt (J.A. 223). Following a show-cause order and a hearing, the district court found the Journal and Hauser guilty of criminal contempt (Pet. App. A1-A22). The court explained that the purpose of the restraining order "was to hold matters in *status quo* pending a brief interlude for research and contemplation" (*id.* at A13). That interlude was necessary, the court explained, because even the Journal had not called the court's attention to any relevant precedent concerning the court's jurisdiction prior to its decision to publish (*id.* at A12); instead, the court noted, the Journal had requested an extra day to prepare for the hearing on the preliminary injunction (*id.* at A10-A11). In these circumstances, the court concluded, the Journal had no right to "seize[] the judicial power to itself" by defying the order (*id.* at A22). The district court fined the Journal $100,000 and ordered Hauser to perform 200 hours of community service (*id.* at A23-A26).

On appeal, a panel of the First Circuit overturned the convictions (Pet. App. A27-A46) because, in its view, the November 13 temporary restraining order on which the contempt was predicated was "transparently invalid" under the First Amendment (*id.* at A45). The panel recognized that "[a]s a general rule, a party may not violate an order and raise the issue of its constitutionality

collaterally as a defense in the criminal contempt proceeding" (*id.* at A32). The panel concluded, however, that an exception to this general rule is required when a "transparently invalid" injunction is involved (*id.* at A33). The panel determined that none of the grounds put forward in support of the temporary restraining order—the FOIA, the federal wiretapping statute, or the Fourth Amendment—provided even a colorable basis for the order, particularly in light of the First Amendment's heavy presumption against prior restraints (*id.* at A38-A41).

The court of appeals, sitting en banc, subsequently modified the panel's opinion, but it left in place the panel's order reversing the contempt convictions (Pet. App. A47-A49). The en banc court held that even when a "transparently invalid" order is involved, the party subject to the order must "make a good faith effort to seek emergency relief from the appellate court" before disobeying the order (*id.* at A48). Although respondents had made no such effort, the en banc court nonetheless declined to reinstate the contempt convictions. The court found itself "without a clear conviction" that timely emergency relief could have been obtained before the Journal had to make its final editorial decision about the contents of its November 14 editions. The court also regarded it as unfair to subject the Journal to criminal sanctions because it had failed to follow a procedure that the court of appeals had not previously announced. *Id.* at A49.

SUMMARY OF ARGUMENT

I. This case involves a contempt based on the violation of an order of a federal court. The offense in this case is defined by 18 U.S.C. 401(3), which makes it a crime to engage in "[d]isobedience or resistance" to a federal court's "lawful writ, process, order, rule, decree, or command." This Court's decisions make clear that an order is not "lawful" for purposes of criminal contempt if it is beyond the jurisdiction of the issuing court. At the same time,

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however, an order does not cease to be "lawful" merely because it is erroneous. As long as the order is within the court's jurisdiction, the fact that the order may later be held to be erroneous does not entitle a person subject to the order to disregard it with impunity. Moreover, even if a federal court ultimately lacks jurisdiction over the subject matter of a case or the authority to grant the requested relief, the court possesses jurisdiction to determine its jurisdiction at the outset. As a result, an order designed to preserve the status quo temporarily while the court reviews the substance of the dispute is a "lawful" order within the meaning of Section 401(3), and a violation of that order will support a conviction for criminal contempt.

The court of appeals held that respondents were excused from their refusal to comply with the temporary restraining order because that order was "transparently invalid." In our view, however, as long as an order is within the jurisdiction of the issuing court, Section 401(3) does not distinguish between "transparently" invalid orders and "merely" invalid orders; nor do we see any way in which such a distinction can be given meaningful content. The correctness of an order is relevant to liability under Section 401(3) only if the order is invalid because the underlying claim is too insubstantial even to vest the court with federal-question jurisdiction.

II. Even if the court of appeals is correct in holding that a party may in some circumstances justifiably refuse to comply with an order that is manifestly unconstitutional, respondents were not justified in refusing to comply with the order in this case, because they did not seek to obtain review of the order before violating it. This Court has held that when a party believes that a court's order violates his constitutional rights, he must seek review of that order, rather than simply defy it.

Respondents did not seek reconsideration from the district court or emergency relief from the court of appeals based on any asserted urgency of the matter. To the contrary, while the district court was prepared to address the question of the propriety of injunctive relief within 24 hours, respondents sought additional time to brief that issue. Then, rather than seeking to obtain appellate review of the order, respondents set out to flout that order on the ground that they believed it to be improper. Respondents' failure to seek immediate review of the disputed order—or to show by their effort to do so that prompt review was unavailable—should foreclose them from arguing that they were entitled to disregard the district court's order and to proceed as they saw fit.

ARGUMENT

I. REFUSAL TO COMPLY WITH AN ORDER OF A FEDERAL COURT CONSTITUTES CRIMINAL CONTEMPT IN VIOLATION OF 18 U.S.C. 401(3) UNLESS THE ORDER EXCEEDS THE JURISDICTION OF THE COURT

1. The power of the federal courts to impose criminal sanctions for disobedience of their orders was first codified in the Judiciary Act of 1789. Section 17 of the Judiciary Act, ch. 20, 1 Stat. 83, provided that the courts of the United States "shall have power * * * to punish by fine or imprisonment * * * all contempts of authority in any cause or hearing before the same [courts]." The Judiciary Act did not attempt to define "contempts of authority," leaving it to the federal courts to determine what conduct would be deemed contemptuous. See Frankfurter & Landis, *Power of Congress over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers,* 37 Harv. L. Rev. 1010, 1024 (1924); see also *In re Savin,* 131 U.S. 267, 275-276 (1889).

In 1831, concern over abuses of this open-ended power led Congress to enact a new contempt statute that for the first time defined the types of conduct that could be treated as criminal contempts. The 1831 Act, while pur-

porting to be merely "declaratory" of existing law, provided:

> [T]he power of the several courts of the United States to * * * inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said courts, * * * the misbehaviour of any of the officers of the said courts in their official transactions, and *the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts.*

Act of Mar. 2, 1831, ch. 99, § 1, 4 Stat. 487-488 (emphasis added). See *Bloom* v. *Illinois*, 391 U.S. 194, 202-203 (1968); *United States* v. *Barnett*, 376 U.S. 681, 687 (1964); *Nye* v. *United States*, 313 U.S. 33, 45-48 (1941).[5]

The 1831 Act survives today, in substantially its original form, as Section 401 of Title 18. See *Bloom*, 391 U.S. at 203-204. The final clause of Section 1 of the 1831 Act, imposing criminal contempt for disobedience or resistance to lawful orders of the courts, is currently codified in Section 401(3). Section 401(3) provides that a court of the United States shall have the power to punish, by fine or imprisonment, "[d]isobedience or resistance to [the court's] lawful writ, process, order, rule, decree, or command." It is

[5] The 1831 legislation was prompted by the action of District Judge Peck, who jailed and disbarred an attorney for publicly criticizing one of the judge's rulings. That episode culminated in Judge Peck's impeachment by the House of Representatives, although he was acquitted in the Senate. See *Bloom*, 391 U.S. at 203; *Nye*, 313 U.S. at 45-48; Frankfurter & Landis, *supra*, 37 Harv. L. Rev. at 1024-1027; Nelles & King, *Contempt by Publication in the United States*, 28 Colum. L. Rev. 401, 423-430 (1928).

therefore Section 401(3) that governs the liability of respondents in this case.[6]

2. Section 401(3), like its 1831 predecessor, confines criminal contempt to violations of "lawful" judicial orders. It seems clear that Congress deliberately sought to distinguish "lawful" orders, whose violation constitutes a prima facie case of criminal contempt, from "unlawful" orders, whose violation does not. The line dividing the two categories is demonstrated by this Court's precedents.

It has long been settled that a person may not be held in criminal contempt for violation of an order that exceeds the jurisdiction of the issuing court. See, *e.g.*, *United States* v. *United Mine Workers*, 330 U.S. 258, 291 (1947); *In re Sawyer*, 124 U.S. 200, 221-222 (1888); *Ex parte Fisk*, 113 U.S. 713, 718 (1885); *Ex parte Rowland*, 104 U.S. 604, 612 (1881); *United States* v. *Thompson*, 319 F.2d 665, 668 (2d Cir. 1963); *Heasley* v. *United States*, 312 F.2d 641, 649 (8th Cir. 1963). Thus, if a district court lacks subject matter jurisdiction over a controversy, violation of an injunction in favor of the plaintiff does not give rise to criminal contempt (see, *e.g.*, *United Mine Workers*, 330 U.S. at 294; *Ex parte Rowland*, 104 U.S. at 612; cf. *In re Green*, 369 U.S. 689, 692 (1962)), at least if the question of the

[6] We do not understand this Court's recent decision in *Young* to suggest that litigants may be subjected to criminal liability for violation of orders in circumstances that are not covered by 18 U.S.C. 401. The Court noted in *Young* that federal courts have long been held to "possess inherent authority to initiate contempt proceedings for disobedience to their orders" (slip op. 5). The Court also noted, however, that the contempt power is subject to regulation by Congress, as long as that regulation does not " 'abrogate[ ] nor render practically inoperative' " the courts' exercise of that power (slip op. 11, quoting *Michaelson* v. *United States ex rel. Chicago, S.P., M & O. Ry.*, 226 U.S. 42, 66 (1924)). The 1831 statute and its successors have been upheld as a valid form of regulation of the contempt power. See *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510-511 (1873) (preexisting authority of inferior federal courts over the subject matter of criminal contempts was validly limited by the 1831 Act).

court's subject matter jurisdiction was not actually litigated in connection with the issuance of the injunction. See *United Mine Workers*, 330 U.S. at 292 n.57; cf. *Stoll* v. *Gottlieb*, 305 U.S. 165 (1938); Restatement (Second) of Judgments § 12 comment c (1982).

It is equally clear that an order that is within the jurisdiction of the issuing court is not "unlawful" simply because it is erroneous. This Court and other federal courts have consistently held that such orders must be obeyed until they are set aside on appeal; they therefore may give rise to a conviction for criminal contempt for a violation that occurred while they were in effect. See, *e.g.*, *GTE Sylvania, Inc.* v. *Consumers Union*, 445 U.S. 375, 386 (1980); *United Mine Workers*, 330 U.S. at 293; *Walker* v. *City of Birmingham*, 388 U.S. 307, 314 & n.5 (1967) (discussing federal precedents); *In re Sawyer*, 124 U.S. at 220 (quoting *Elliott* v. *Peirsol*, 26 U.S. (1 Pet.) 328, 340 (1828)); *Worden* v. *Searls*, 121 U.S. 14, 27 (1887); *Dolman* v. *United States*, 439 U.S. 1395 (1978) (Rehnquist, J., Circuit Justice); *United States* v. *Lowery*, 733 F.2d 441, 445-446 (7th Cir.), cert. denied, 469 U.S. 932 (1984); *Pennsylvania* v. *Local Union 542*, 552 F.2d 498, 505-506 (3d Cir.), cert. denied, 434 U.S. 822 (1977).[7]

This principle that a court's decision is "to be respected" unless "reversed for error by orderly review either by itself or by a higher court" (*Howat* v. *Kansas*, 258 U.S. 181, 190 (1922)) "has been uniformly held to be necessary to the protection of the court from insults and oppressions while in the ordinary exercise of its duties, and to enable it to enforce its judgments, and orders necessary to the due administration of law, and the protection of the rights of

[7] See also *Sheet Metal Workers Local 28* v. *EEOC*, No. 84-1656 (July 2, 1986), slip op 16 n.21 (quoting *Maggio* v. *Zeitz*, 333 U.S. 56, 69 (1948) ("a 'contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy' ")).

suitors" (*Ex parte Fisk*, 113 U.S. at 718). By contrast, " '[i]f a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls "the judicial power of the United States" would be a mere mockery' " (*Young*, slip op. 8, quoting *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911)). Such an approach also would invite disrespect for the law. Accordingly, " '[t]he procedure to enforce a court's order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience.' " *United States* v. *Rylander*, 460 U.S. 752, 756-757 (1983) (quoting *Maggio* v. *Zeitz*, 333 U.S. 56, 69 (1948)).

In light of these well-settled principles, it appears that when Congress enacted the predecessor to 18 U.S.C. 401(3), it sought to codify the distinction between orders that are wholly beyond the jurisdiction of the issuing court and orders that, even if erroneous, are within the court's jurisdiction (and therefore not subject to readjudication in a contempt proceeding). By its terms, Section 401(3)—like its predecessors—requires not that the underlying order be "correct," but only that it be "lawful." An order that is erroneous but nonetheless within the power of the court to issue would not normally be thought of as unlawful. Although Congress undoubtedly sought to cabin the authority of federal courts to punish contempts when it enacted the predecessor to Section 401 in 1831, there is no indication that it meant to make *every* judicial order subject to collateral attack in subsequent criminal contempt proceedings.[8]

[8] The contemporaneous understanding of the scope of habeas corpus jurisdiction supports the view that when Congress referred to "lawful" orders in the 1831 statute, it meant orders that are within the jurisdiction of the court to issue. One year earlier, in a decision construing the first federal habeas corpus statute, the Court referred to

3. An additional consideration arises where, as here, the order that allegedly was violated was issued on a temporary basis to maintain the status quo pending a more thorough assessment of the underlying controversy. Compare *Walker* v. *City of Brimingham,* 388 U.S. at 333-334 (Warren, C.J., dissenting). Federal courts have jurisdiction to determine their jurisdiction. 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* § 3536 (2d ed. 1984). An order designed to protect this limited form of jurisdiction by temporarily preserving the status quo is within a federal court's power,[9] even if it is subsequently determined that the court lacks subject matter jurisdiction over the claim. Accordingly, such an interim order is within the jurisdiction of the issuing court and therefore "lawful" for purposes of 18 U.S.C. 401(3), and a violation of the order is subject to criminal sanctions under that statute.

Two decisions by this Court illustrate this principle. *United States* v. *Shipp,* 203 U.S. 563 (1906), involved criminal contempt proceedings initiated by the Attorney General in this Court against state officials who had violated a stay of execution issued by the Court in an appeal from a decision rendered by a circuit court in a habeas corpus proceeding. The contemnors defended on the ground that the Court lacked subject matter jurisdiction over the appeal and that they therefore were not criminally liable for violating the stay order. The Court rejected that argument, holding that even if the Court ultimately lacked

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the concept of a lawful order in precisely that way. *Ex parte Watkins,* 28 U.S. (3 Pet.) 193, 203 (1830) ("An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity, if the court has general jurisdiction of the subject, although it should be erroneous.")

[9] See 28 U.S.C. 1651(a): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

subject matter jurisdiction, the stay order was within the Court's inherent power to preserve the status quo while determining its jurisdiction and therefore supported criminal contempt (*id.* at 573):

> [E]ven if the Circuit Court had no jurisdiction to entertain [the habeas] petition, and if this court had no jurisdiction of the appeal, this court, and this court alone, could decide that such was the law. It and it alone necessarily had jurisdiction to decide whether the case was properly before it. On that question, at least, it was its duty to permit argument and to take the time required for such consideration as it might need. * * * Until its judgment declining jurisdiction should be announced, it had authority from the necessity of the case to make orders to preserve the existing conditions and the subject of the petition * * * .

The Court reached the same conclusion in *United States* v. *United Mine Workers, supra.* At issue in *United Mine Workers* was a criminal contempt charge based on violations of a temporary restraining order prohibiting a coal strike. The Court ruled that even if it ultimately were held that the Norris-La Guardia Act divested the district court of authority to enjoin the strike, the district court "had the power to preserve existing conditions while it was determining its own authority to grant injunctive relief" (330 U.S. at 293). Accordingly, "[t]he defendants * * * acted at their peril" in violating the restraining order and "[t]heir disobedience is punishable as criminal contempt" (*ibid.*; see *id.* at 310-311 (Frankfurter, J., concurring in the judgment) ("[I]f the district court had power to decide whether this case was properly before it, it could make appropriate orders so as to afford the necessary time for fair consideration and decision while existing conditions were preserved.")). *United Mine Workers* "stands for the proposition that a trial court can issue a temporary restraining order to maintain the status quo while it is determining its

authority to act further in the case." C. Wright, A. Miller & E. Cooper, *supra*, § 3537, at 543 (footnote omitted). The case also stands for the equally important proposition that violation of such an order constitutes criminal contempt.[10]

4. The court of appeals suggested that disobedience of a federal court order does not constitute criminal contempt if the order is "transparently invalid." The court did not indicate specifically how orders that are "transparently" invalid are to be distinguished from orders that are "merely" invalid. Neither did the court attempt to connect the notion of a "transparently invalid" order to the language or policies of Section 401(3), a statute that the court of appeals appears to have overlooked. We submit that the concept of a "transparently invalid" order is relevant only in a limited fashion under Section 401(3), and then only as a way of expressing the principle that criminal contempt cannot rest on orders that are beyond the jurisdiction of the issuing court.[11]

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[10] The Court noted in *United Mine Workers* that a different result might follow "were the question of jurisdiction frivolous and not substantial" (330 U.S. at 293). Justice Frankfurter, who provided the necessary fifth vote in favor of sustaining the district court's injunction, explained that this exception would apply only where the district court's jurisdictional authority "ha[d] unquestionably been withheld" by Congress (*id.* at 310 (Frankfurter, J., concurring in the judgment)). Accord *In re Green*, 369 U.S. at 693 (Harlan, J., concurring in part and dissenting in part) (disobedience of a temporary restraining order may be punished as criminal contempt where the court's "claim to jurisdiction over the underlying proceeding is not frivolous"); *GTE Sylvania*, 445 U.S. at 386 (quoting *Walker* v. *City of Birmingham*, 388 U.S. at 315 (" 'only a frivolous pretense to validity' ")). Compare *Stump* v. *Sparkman*, 435 U.S. 349, 357-360 (1978). In this case, even if the district court ultimately lacked authority to grant relief, the question of its jurisdiction cannot be dismissed as "frivolous," nor was its jurisdiction "unquestionably • • • withheld" by Congress.

[11] As the court of appeals noted, this Court's opinion in *Walker* states that "this is not a case where the injunction [underlying the contempt conviction] was transparently invalid • • •" (388 U.S. at 315). It is unclear from the Court's opinion what significance, if any, the Court meant to attach to that fact. The Court presumably did not mean to deny that the injunction was an unconstitutional prior restraint, for the Court at the same time acknowledged that both the injunction and the permit ordinance on which it was based presented "substantial constitutional question[s]" (*id.* at 316-317), and the Court unanimously struck down the ordinance as an unconstitutional prior restraint two Terms later in *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969). Thus, the reference to "transparent invalidity" in *Walker* must be read as referring to an injunction that is not merely unconstitutional, or even plainly unconstitutional, but so utterly without basis that the issuing court is acting as "a pretender to, not a wielder of, judicial power" (*United Mine Workers*, 330 U.S. at 310 (Frankfurter, J., concurring in the judgment)). Whatever its failings, the injunction in this case was not such an order; it was no more "transparently invalid" than the injunction in *Walker* itself.

If a plaintiff's claim is utterly baseless as a matter of federal law, an injunctive order predicated on the claim would not be "lawful" for purposes of Section 401(3)—not because the order is invalid in some abstract sense, "transparently" or otherwise, but simply because it rests on a claim that is so insubstantial as to deprive the court of subject matter jurisdiction.[12] Even in that situation, as *United Mine Workers* and *Shipp* demonstrate, preliminary injunctive orders designed to preserve the status quo pending determination of the jurisdictional question remain "lawful" for purposes of criminal contempt. Indeed, the specific jurisdictional objection raised by the contemnors in *Shipp* was that "the case did not involve the application of the Constitution, otherwise than by way of pretense"—in short, an argument that the case did not present a substantial federal question. See 203 U.S. at 572.

[12] A complaint that states a federal claim on its face may nonetheless fall outside the reach of federal question jurisdiction, but such cases are rare: prior decisions must render the claim inescapably frivolous (*Goosby* v. *Osser*, 409 U.S. 512, 518 (1973)), or the claim must be so insubstantial as to be clearly without merit. *Hagans* v. *Levine*, 415 U.S. 528, 536 (1974).

In applying its test of "transparent invalidity" in this case, the court of appeals simply analyzed each of the three causes of action pleaded in the complaint and concluded that none of them would justify injunctive relief against the Journal (Pet. App. A38-A40). That approach, however, ignores the fact that the district court was granting only a two-day temporary restraining order, not permanent or even preliminary injunctive relief. See *id.* at A12, A18-A19; J.A. 61. The district court did not have the leisure that the court of appeals had to determine whether any of the claims in the complaint could conceivably support a request for an injunction. Nonetheless, the complaint clearly invoked the district court's subject matter jurisdiction, and the Journal was clearly subject to the court's personal jurisdiction. The court therefore had jurisdiction to enter an order staying the publication of the materials pending a hearing two days later. For this reason, the order was "lawful" within the meaning of 18 U.S.C. 401(3), and the district court properly held respondents in contempt for deliberately violating it.

Nor is this a case in which Congress or the Constitution has announced any absolute bar to injunctive relief. Although there is a heavy presumption against prior restraints of any type, this Court has never held that prior restraints are absolutely prohibited. See *Southeastern Promotions Ltd.* v. *Conrad*, 420 U.S. 546, 558 (1975) ("Prior restraints are not unconstitutional *per se*."). Moreover, this Court has never held that a federal court may not ever exercise its authority to maintain the status quo pending a determination whether a prior restraint is appropriate in a particular case. To the contrary, this Court itself entered such orders in *New York Times Co.* v. *United States*, 403 U.S. 942 (1971), and *United States* v. *Washington Post Co.*, 403 U.S. 943 (1971). See also *Morland* v. *Sprecher*, 443 U.S. 709 (1979). The power of a district court to do so is supported not only by the statutory authority that federal courts have enjoyed since 1789 to issue writs in aid

of their jurisdiction (see 28 U.S.C. 1651(a); Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81-82), but also by the courts' general equitable jurisdiction, the "comprehensiveness of [which] is not to be denied or limited in the absence of a clear and valid legislative command." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946). See also *Amoco Production Co.* v. *Village of Gambell*, No. 85-1239 (Mar. 24, 1987), slip op. 9-10; *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 313 (1982); *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944).

II. AT LEAST IN THE ABSENCE OF EFFORTS TO HAVE THE TEMPORARY RESTRAINING ORDER SET ASIDE, RESPONDENTS CANNOT DEFEND AGAINST CHARGES OF CRIMINAL CONTEMPT ON THE GROUND THAT THE ORDER WAS "TRANSPARENTLY INVALID"

The panel below acknowledged the general rule, established by this Court's cases and embodied in 18 U.S.C. 401(3), that an order that is within the jurisdiction of the issuing court must be obeyed unless and until it is set aside on further review, and that a person who violates the order while it remains in effect is subject to punishment for criminal contempt. See Pet. App. A32-A34. The panel nevertheless fashioned an exception to that rule for situations in which the order is collaterally attacked in the contempt proceedings on First Amendment grounds and the order is found in those proceedings to have been "transparently invalid" (*id.* at A34-A38). On rehearing en banc, the full court of appeals concluded that even where the party believes that the order is transparently invalid, he cannot raise that defense in the contempt proceedings unless he made a good faith effort to seek emergency relief from an appellate court.

We agree with the en banc court of appeals that even where a party believes that an injunctive order affecting First Amendment rights is erroneous, he cannot simply take the law into his own hands and defy the order with impunity. A proper respect for the judicial process and the

compelling governmental interest in ensuring compliance with judicial orders require that the party make a good faith effort to have the order set aside on direct review by the issuing court and appellate courts, rather than attack that order collaterally in subsequent contempt proceedings. In this case, there is no basis for believing that prompt relief was foreclosed, because the federal judicial system is structured to accommodate expedited proceedings. Since respondents concededly made no effort to seek relief from the temporary restraining order before they deliberately violated it (J.A. 36), respondents' contempt convictions should be reinstated—even if we assume that a party who did seek relief might be excused from complying with a manifestly unconstitutional order if relief proved to be unavailable.

1. This Court's decisions make clear that the general principle that a party cannot "make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside" (*Gompers*, 221 U.S. at 450), applies in full force to orders that are alleged to be invalid on constitutional grounds. Thus, in *Walker* v. *City of Birmingham*, where an injunction (prohibiting parades and demonstrations) was challenged on First Amendment grounds, the Court held (388 U.S. at 314 (quoting *Howat* v. *Kansas*, 258 U.S. at 189-190)):

> An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its

> orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.

Consistent with this principle, the Court in *Walker* rejected the contention "that the Constitution compelled Alabama to allow the petitioners to violate this injunction * * * without any previous effort on their part to have the injunction dissolved or modified, or any attempt to secure a parade permit in accordance with its terms" (388 U.S. at 315).

The Court expressed a similar view in *Vance* v. *Universal Amusement Co.*, 445 U.S. 308 (1980), which involved a First Amendment challenge to a state statute that authorized a court to issue an order imposing a prior restraint of indefinite duration on the exhibition of films that had not been finally determined to be obscene. The Court held that the particular statutory scheme violated the First Amendment because it did not contain adequate procedural safeguards to assure that the merits were promptly resolved and that the prior restraint pendente lite was correspondingly limited (445 U.S. at 315-316). But the Court stated that where a court does temporarily bar exhibition of a film under such a scheme, "[p]resumably, an exhibitor would be required to obey such an order pending review of its merits and would be subject to contempt proceedings even if the film is ultimately found to be nonobscene" (445 U.S. at 316 & n.15, citing *Walker* and *United Mine Workers*). See also *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175, 179 (1968) (the parties followed the "proper procedure" under *Walker* by seeking review of an injunction that barred demonstrations and complying with the injunction pending review); *National Socialist Party* v. *Village of Skokie*, 432 U.S. 43, 44 (1977); *Morland* v. *Sprecher*, 443 U.S. at

709-710; cf. *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 439 (1976).[13]

2. Although the Court in *Walker* adhered to the established rule that a party must obey even an allegedly unconstitutional order until it is set aside, the Court did state that "[the] case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay or frustration of their constitutional claims" (388 U.S. at 318). But the Court observed that there was no indication that the petitioners' claims would have encountered such a reception in the state courts and that, in any event, the petitioners "g[a]ve absolutely no explanation of why they did not make some application to the state court" to modify the injunction during the two-day period between its issuance and the scheduled date of one the marches (*id.* at 318-319). The

[13] Different procedures have been developed in the case of the assertion of a claim of privilege during a criminal trial or grand jury proceeding. Rather than allowing an immediate appeal from a judicial order rejecting the claim, which might disrupt the proceeding, the Court has construed the applicable statutory provisions to foreclose such an appeal and instead to allow a challenge to the order to be raised as a defense in a contempt proceeding, if the subject of the order chooses to resist compliance. See, *e.g.*, *United States* v. *Ryan*, 402 U.S. 530, 532-533 (1971); *Cobbledick* v. *United States*, 309 U.S. 323 (1940); see also *Maness* v. *Meyers*, 419 U.S. 449, 460-461 (1975). These cases demonstrate that a legislature may provide different ways to challenge the validity of a judicial order. The *Walker* case makes clear that there is no constitutional bar to a scheme that requires, in the case of prohibitory injunctions, that a challenge to the injunction be made, if at all, by a motion to the issuing court to modify the order or on direct appeal of the order, rather than by collateral attack in the ensuing contempt proceeding. In *Ryan*, the Court confirmed that its "holding [in *Walker*] that the [constitutional] claims * * * sought to be asserted were not open on review of petitioners' contempt convictions was based on the availability of review of those claims at an earlier stage" (402 U.S. at 532 n.4).

Court explained that the injunction had been entered ex parte and that the trial court therefore might have modified or dissolved it if the petitioners had presented that court with their arguments concerning the breadth and vagueness of the injunction and the municipal ordinance it was intended to enforce, as well as their claims of discriminatory enforcement (*ibid.*). The court further explained that if the trial court had denied relief, "Alabama procedure would have provided for an expedited process of appellate review"; and it "[could not] be presumed that the Alabama courts would have ignored the petitioners' constitutional claims," since similar contentions were accepted by an Alabama appellate court in another case (*id.* at 319 (footnote omitted)).

Walker thus teaches, as a corollary to the principle that a judicial order must be obeyed until it is set aside, that where there are facially valid procedures for seeking review of a restraining order, a party who is subject to that order cannot collaterally attack its constitutionality in subsequent contempt proceedings unless, at a minimum, he first sought to invoke those procedures and was denied a meaningful opportunity for relief.

3. In this case, as in *Walker*, applicable rules and procedures in the federal judicial system afforded respondents several avenues for seeking relief from the restraint that the district court imposed on the Journal's publication of the information it had obtained from the FBI.

a. As an initial matter, respondents could have sought relief from the district court. Preliminary orders in civil litigation often are entered before the court has had a full opportunity to review the substance of the parties' contentions. In particular, temporary restraining orders often are entered solely to preserve the status quo, with only limited attention to the merits of the parties' underlying claims. See, *e.g.*, *Granny Goose Foods, Inc.* v. *Brotherhood of Teamsters Local 70*, 415 U.S. 423, 441-444 (1974). For that reason, a litigant who has substantial legal and equitable objections to a temporary restraining order will

often be able to obtain relief from the issuing court, which might either vacate the restraining order or decline to enter a preliminary injunction when the restraining order expires at the end of the 10-day period specified by Fed. R. Civ. P. 65(b) or the lesser period specified by the issuing court.

In this case, there was no reason for respondents to forgo the opportunity to obtain relief from the district court. That court indicated in its opinion holding respondents in contempt that prior to publication of the article on November 14, 1985, the Journal had not called to the court's attention any authority relevant to the question of the court's jurisdiction to bar publication (Pet. App. A12-A13), and the court was not even informed of the precise nature of the material that the plaintiff sought to have withheld from the public when it entered the temporary restraining order (*id.* at A17; J.A. 60).

Moreover, by proposing to set a hearing for the day after it entered the restraining order, the district court manifested its intention to resolve immediately the question of continuing the restraint. See J.A. 73.[14] But rather than take advantage of that opportunity for an especially expeditious resolution, the Journal's attorney informed

[14] Respondents thus were not confronted in the trial court with a procedural system that provided for an injunction pendente lite of indefinite duration, which was the defect the Court found in the provision for judicial imposition of prior restraints in *Vance* v. *Universal Amusement Co., supra*. See 445 U.S. at 316-317. Nor does the federal system permit the sort of ex parte prior restraints that were found to violate the First Amendment in *Carroll*, 393 U.S. at 180-185. Rule 65(b), Fed. R. Civ. P., provides that a temporary restraining order may not be issued without notice to the opposing party, unless it clearly appears that irreparable injury will result and the applicant's attorney details the efforts that have been made to give notice and the reasons why notice should not be required. In any event, the order in this case was not issued ex parte, and counsel for the Journal in fact opposed it on the ground that any prior restraint would violate the First Amendment (Pet. App. A29; J.A. 166, 169, 170-173).

the court that he could not be prepared for a hearing the next day, and for that reason the court postponed the hearing—and extended the restraining order—for an additional day (Pet. App. A3, A18). Respondents therefore are in no position to argue that the district court would not have given expeditious consideration to their objections to an order that they now claim was "transparently invalid." Compare *Morland* v. *Sprecher*, 443 U.S. at 709-710. Nor did respondents take other steps, such as asking the district court to expedite the hearing, when they decided to violate the restraining order before the scheduled date of the hearing on November 15. Respondents also failed to notify the district court and the other parties, even though the request by the Journal's attorney for additional time presumably left the district court and the other parties with the impression that the Journal intended to respect the restraining order while it remained in effect.

Finally, when the district court did rule on the plaintiffs' request for a preliminary injunction—on November 19, 1985, which was only six days after the restraining order was issued—the court denied that request in light of respondents' constitutional arguments (J.A. 73-85). Thus, if respondents had followed orderly procedures in the district court, it is highly likely that the matter would have been resolved promptly, and in a manner favorable to respondents.

b. Aside from the possibility that the district court would have granted relief, respondents could have sought appellate review of the restraining order. The panel noted that "the Journal arguably had avenues of appellate relief immediately available to it" (Pet. App. A44 (footnote omitted)). For example, the panel observed that under First Circuit precedent, the district court's order, although labeled a temporary restraining order, might have been immediately appealable as of right under 28 U.S.C. 1292(a)(1) on the ground that it was essentially the equivalent of an injunction. See Pet. App. A44 & n.70,

citing *Societe Generale de Surveillance* v. *Ratheon European Management & Systems Co.*, 643 F.2d 863, 864-865 n.2 (1st Cir. 1981).[15] Furthermore, if the restraining order was as far beyond the scope of the district court's authority as respondents maintain, the court of appeals presumably could have granted mandamus relief under 28 U.S.C. 1651 and Fed. R. App. P. 21(a). See *Kerr* v. *United States District Court*, 426 U.S. 394, 402 (1976) (quoting *Will* v. *United States*, 389 U.S. 90, 95 (1967) (" 'exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy' ")); see also *Societe Nationale Industrielle Aerospatiale* v. *United States District Court*, No. 85-1695 (June 15, 1987), slip op. 4-5.

It also is clear that procedures were available by which respondents could have sought expedited appellate review. The courts of appeals, like all courts of the United States, are "deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." 28 U.S.C. 452. Although the Federal Rules of Appellate Procedure and the local rules of the courts of appeals establish schedules for the consideration of appeals, Fed. R. App. P. 2 permits a court of appeals to suspend the appellate rules "[i]n the interest of expediting decision." The advisory committee note to Rule 2 states that "[t]he primary purpose of this rule is to make clear the

[15] In view of the special sensitivity under the First Amendment of even a brief prior restraint, as well as respondents' claims of irreparable injury resulting from such an order, the temporary restraining order reasonably could be regarded as having the same substantive impact as a preliminary injunction, which is immediately appealable under 28 U.S.C. 1292(a)(1). See *Sampson* v. *Murray*, 415 U.S. 61, 86-87 (1974); *OPM* v. *AFGE*, 473 U.S. 1301, 1304-1305 (1985) (Burger, Circuit Justice); *Belknap* v. *Leary*, 427 F.2d 496, 498 (2d Cir. 1970); cf. *National Socialist Party* v. *Village of Skokie*, 432 U.S. at 45. See generally 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶ 110.20[5] (2d ed. 1987).

power of the courts of appeals to expedite the determination of cases of pressing concern to the public or to the litigants by prescribing a time schedule other than that provided by the rules."[16] In light of respondents' claims concerning the pressing concern to the Journal and to the public of any prior restraint on publication, there is no reason to believe that the First Circuit would have ignored its duty to assure expedited consideration of an appeal. Indeed, if the restraining order was as manifestly invalid as the court of appeals believed when it entertained respondents' collateral attack on that order in these contempt proceedings, it presumably would not have taken long for the court of appeals to reach the same conclusion if respondents had sought direct review of the order. Cf. *Walker*, 388 U.S. at 319.[17]

c. The federal system thus afforded the means for respondents to obtain expeditious consideration of their First Amendment objections to the temporary restraining order. Those procedures are fully consistent with this Court's holding in *National Socialist Party* v. *Village of Skokie*, 432 U.S. at 44, that "[i]f a State seeks to impose a restraint [on expression], it must provide strict procedural safeguards, *Freedman* v. *Maryland*, 380 U.S. 51 (1965), including immediate appellate review, see *Nebraska Press Assn.* v. *Stuart*, 423 U.S. 1319, 1327 (1975) (Blackmun, J., in chambers)." See also *Vance*, 445 U.S. at 316-317; *Morland*, 443 U.S. at 709; *Southeastern Promotions*, 420

[16] See also Rule 27.1 of the Rules of the United States Court of Appeals for the First Circuit.

[17] If the court of appeals had refused to grant relief on a timely basis, respondents could have applied to this Court for a writ of mandamus (see, *e.g.*, *Morland* v. *Sprecher*, *supra*), a stay of the district court's order pending the First Circuit's disposition of the appeal (see, *e.g.*, *M.I.C. Ltd.* v. *Bedford Township*, 463 U.S. 1341, 1343 (1983) (Brennan, J., Circuit Justice)), or a writ of certiorari before judgment (see *Morland*, 443 U.S. at 712 (White, J., dissenting)).

U.S. at 559-562. Accordingly, under *Walker*, respondents were obligated to seek review of the order within the judicial framework. See *United States* v. *Dickinson*, 465 F.2d 496, 511 (5th Cir. 1972).

4. The en banc court of appeals concluded (Pet. App. A49) that respondents should not be held in contempt because it did not have a "clear conviction" that emergency relief could have been obtained from the court of appeals within the period of 8-1/2 hours between the entry of the district court's order and the hour at which respondents had to decide whether to include the article in the next day's editions of their newspaper. As an initial matter, there is no reason to believe that the court of appeals would have been unable to entertain any submission by respondents within that period. At the very least, respondents were under an obligation to present the matter to that court, since they were under a presumptively valid restraining order that barred the publication. And even if we assume that respondents could ever have been excused from at least attempting to seek relief on direct review of the allegedly unconstitutional order (but cf. *Engel* v. *Isaac*, 456 U.S. 107, 130 (1982)), respondents bore the burden of justifying their failure to do so. See *Walker*, 388 U.S. at 319. The en banc court therefore clearly erred in excusing respondents from the consequences of their deliberate disregard of the judicial process on the ground that the court was not convinced that relief actually would have been available.

The more fundamental flaw in the en banc court's reasoning, however, is its assumption that the question whether there was an adequate opportunity for appellate relief must be determined by reference to respondents' own publishing deadlines. To be sure, respondents were of the view that any delay in the publication of the material at issue was a continuing violation of the First Amendment and would cause irreparable injury (cf. *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 560-561 (1976)), and that their interest in publishing at will was not outweighed by

the interest of the courts in having sufficient time for "mature consideration of the questions involved" (*Morland*, 443 U.S. at 712 (White, J., dissenting)) and the interest of the plaintiff in having his claim considered on the merits prior to publication. But the manner in which those interests should be weighed was not for respondents to decide. That was a *judicial* function, to be performed by the district court, the court of appeals, or this Court in ruling on an application by respondents for emergency relief. For just as a party cannot "make himself a judge" of the validity of an order at the time it was entered, "and by his own act of disobedience set [it] aside" (*Gompers*, 221 U.S. at 450), so too a party cannot make himself a judge of whether the order should continue in effect pending the time that the appropriate court determines is required for appellate review.

Respondents' preferred publishing schedule of course was a factor that an appellate court would have taken into account—along with the possibility of irreparable injury to other parties, the likelihood of success on the merits, and the public interest—in determining the course and timing of appellate proceedings. But the First Amendment did not render respondents' self-imposed deadline for publishing the material a binding deadline for the courts to perform their responsibility of disposing of the case presented to them. See *Dickinson*, 465 F.2d at 511-512.[18]

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[18] We note as well that two factors in this case undermine any claim of urgency in the publication of the material. First, the article at issue here reported conversations that had taken place more than 20 years earlier, and therefore did not constitute the sort of fast-breaking news for which immediate publication is intrinsically necessary. Second, as of November 13, 1985, the Journal had been in possession of the FBI memoranda and logs for almost five months. J.A. 96-97. Although another newspaper had published an article based on the same materials, respondent Hauser testified that the Journal was not influenced in its publishing decision by the prospect that other newspapers were "rushing into print" (*id.* at 142-143). Moreover, the fact that the Journal's banner headline in the November 14 editions

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5. Because respondents failed to invoke facially adequate procedures for setting aside the temporary restraining order on direct review, they cannot collaterally attack that order in these contempt proceedings. Contrary to the belief of the en banc court (Pet. App. A49), this was not a new requirement, announced for the first time in its opinion. As we have explained, that requirement has been a fundamental principle of contempt jurisprudence from the earliest days, and it was followed in essentially identical circumstances in *Walker*. See 388 U.S. at 319-321. The en banc court of appeals therefore erred in excusing respondents from their procedural default because of a supposed lack of awareness of a duty to seek relief from the temporary restraining order.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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concerned the court's restraining order, rather than the substance of the material, suggests that respondents might have decided to publish the material specifically *because of*, not in spite of, the restraining order. See also *id.* at 124, 139-141, 150, 183.

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